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No. 95-671

In The

Supreme Court of the United States

October Term, 1995

COLUMBIA CONVALESCENT CENTER, INC., COMER HEALTH CARE, INC., SAVANNAH HEALTH CARE, INC., BON AIR LIFE CARE, INC., BROWNWOOD NURSING HOME, INC., LAFAYETTE HEALTH CARE, INC., BAINBRIDGE HEALTH CARE, INC.,

Petitioners,

v.

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does a statute authorizing automatic dismissal after five years without a valid written order violate procedural due process?

(2) Does a statute authorizing dismissal of a civil action after five years without a valid written order violate substantive due process by creating a "irrebuttable presumption" of staleness?

(3) Does a statute requiring that, in order for orders against a state to be valid, the record must affirmatively show five days advance written notice to the state attorney general, violate equal protection?

LIST OF PARTIES

Respondents concur with the list of parties set forth by Petitioners.

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OPINIONS BELOW

Omitted from the Petitioners' Appendix and Opinions Below is the decision of the administrative hearing officer on the merits of the Medicaid reimbursement claim. That order states that there was insufficient evidence to prove that Petitioners' Medicaid reimbursement was not "reasonable and adequate" within the meaning of the Medicaid statutes. It is included in this brief as "Appendix A."

STATEMENT OF JURISDICTION

While this Court has jurisdiction pursuant to 28 U.S.C. § 1257 over the constitutional claims, some aspects of the Petition do not come within this Court's jurisdiction because it raises matters which were not raised below. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). For instance, Petitioners' Questions Presented, number three was not presented to the state courts.

STATEMENT OF THE CASE

This case arose in the Georgia Medicaid agency when several nursing homes challenged their Medicaid provider rates. After an adverse ruling by the state agency, the nursing homes appealed to the Superior Court of Columbia County, which, after the expiration of five years without a valid order, entered an order in favor of the nursing homes, reversing the agency decision.

The issue of the application of the "five-year rule," O.C.G.A. § 9-2-60, was raised in the trial court on a motion to set aside, and the trial court, after a hearing, ruled that the automatic dismissal or "five-year rule" did not bar its consideration of the case on the merits. The Georgia Court of Appeals granted permission to appeal and reversed, holding that the five-year rule had run before the Columbia Superior Court ruled on the merits, thus automatically dismissing the appeal. *Department of Medical Assistance v. Columbia Convalescent Center, Inc.*, 203 Ga. App. 535, 417 S.E. 2d 195 (1992). The Court of Appeals then remanded the case to the Columbia Superior Court for consideration of the constitutional issues.

The superior court found that O.C.G.A. § 9-2-60 violated procedural due process, but that the notice to the attorney general statute did not violate equal protection. On appeal, the Georgia Supreme Court found no denial of procedural due process or violation of equal protection. *Georgia Dept. of Medical Assistance v. Columbia Convalescent Center, et al.*, 265 Ga. 638, 640, 458 S.E. 2d 635 (1995).

REASONS FOR DENYING THE WRIT

I. THE GEORGIA AUTOMATIC DISMISSAL STATUTE DOES NOT VIOLATE PROCEDURAL OR SUBSTANTIVE DUE PROCESS.

The precedent in this Court does not support the Petitioners' argument that Georgia's automatic dismissal statute violates procedural due process. This Court has made it plain in the context of state procedural rules

which terminate a pending civil action that the Fourteenth Amendment requires only an opportunity to be heard at a meaningful time and in a meaningful manner. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The state "certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 437 (1982). *See also, Thomas v. Arn*, 474 U.S. 140, 155 (1985). The automatic dismissal or "five-year rule" in the instant case is such a reasonable procedural rule.

Petitioners cite no on-point decision of this Court in support of their argument that they were entitled to a hearing to determine the fact of "staleness" before their claim could be extinguished. Cases cited by Petitioner are inapposite. *See*, p. 16 of the Petition. In *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), a federal diversity case was dismissed when plaintiff's counsel failed to appear at a pre-trial conference. This Court upheld the district court's authority to dismiss an action without advance notice or an adjudicatory hearing. There was evidence in the record that counsel had arguably inadequate notice of the pre-trial conference. This case did not turn on procedural due process.

The *Logan v. Zimmerman Brush* case is clearly distinguishable from the case at bar, as is *Societe International v. Rogers*, 357 U.S. 197 (1959). The *Societe* case turns on interpretation of the Federal Rules of Civil Procedure, although this Court noted that Fifth Amendment due process concerns guided its decision. The holding of that case is that the action should not have been dismissed when the plaintiff failed to comply with the district

court's order to produce documents, because compliance was not within the plaintiff's ability. Not one of the cases cited in Petitioners' Brief stands for the proposition that whenever a state procedural rule terminates an action or appeal, then the plaintiff or appellant is entitled to advance notice and hearing.

The statute in question here provides simply that unless a valid order is entered within five years, the case is automatically dismissed. Petitioners had a generous period of time in which to have their appeal adjudicated. The date that Petitioners' case was dismissed was not a hearing date that was set by the court; it was a fixed time set by statute. This was not a case that was to be decided by the trial court *de novo*. Instead, it was an administrative appeal to the superior court to be decided on an "any evidence" standard. *See Johnson v. Ellis*, 174 Ga. App. 861, 331 S.E. 2d 884 (1985). In that context, five years is more than a sufficient time in which the petitioners could have had their appeal adjudicated. However, they did not. During the whole five-year period, only two *ex parte* orders were entered, one substituting counsel and one of continuance. Only at the end of the five-year period did Petitioners even seek a hearing on their appeal. Thus, it is inaccurate to state, as Petitioners did on page 14 of the Petition for Certiorari, that "[t]his case was vibrant."

Similarly, Petitioners have no substantive due process claim phrased as an "irrebuttable presumption" claim. Like a statute of limitations, the "five-year rule" requires that action be taken before the end of a prescribed period of time. As this Court recognized in the case of *United States v. Locke*, 471 U.S. 84 (1984), the "irrebuttable presumption" doctrine is not triggered

when the legislature prescribes a time limit of this sort. In the *Locke* case, this Court considered a federal statute which extinguished mining claims unless certain notices were filed within three years. The "irrebuttable presumption" analysis (urged by the Appellees) was rejected in favor of the concept that the property loss could have been averted with minimal burden on the Appellees. "[I]t was their failure to file on time – not the action of Congress – that caused the property right to be extinguished." *Id.* at p. 107. The instant case is similar. There is no presumption of "staleness" as Petitioners argue. There is merely a deadline to be met and Petitioners failed to meet it. It is not a question of the state acting or failing to act, preventing Petitioners from their day in court. *Compare Logan v. Zimmerman Brush, supra.* Petitioners simply failed to obtain a valid order within five years and their appeal was extinguished as a matter of law. Under these circumstances due process is not violated. *See Locke, supra. See also, Goeke v. Branch,* 514 U.S. ___, 115 S. Ct. ___, 131 L.Ed.2d 152, 159 (1995). (State not required by due process to provide an appellate process.)

II. THE STATUTE REQUIRING NOTICE TO THE STATE ATTORNEY GENERAL DOES NOT VIOLATE EQUAL PROTECTION

The Georgia appellate courts determined there were no "valid" orders and therefore the "five-year rule" was not tolled. The reason for that ruling is that the two orders entered during the five years were void because they were *ex parte,* without the statutorily required advance notice to the state attorney general. *See* O.C.G.A. § 9-10-2.

Petitioners challenge that statute on equal protection grounds. Again, Petitioners have no good authority from this Court to support their argument. The precedent from this Court is clear that, absent a fundamental right or suspect classification, the most relaxed and tolerant level of scrutiny is applied. *See, e.g., Dallas v. Stanglin*, 490 U.S. 19, 26 (1988). Even if classifications are imperfect, so long as there is some rational basis, the Equal Protection Clause is not violated. *Id., quoting Dandridge v. Williams*, 397 U.S. 471 (1970). *Accord, Heller v. Doe*, 509 U.S. ___, 125 L.Ed.2d. 257, 270, 113 S.Ct. 2637 (1993). (Classification must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification.")

In the instant case, the Georgia Supreme Court pointed out the rational basis for requiring advance notice to the state attorney general, but not requiring that notice to other entities or persons. The Georgia Attorney Generals' office is located in Atlanta, Georgia, yet it represents numerous agencies and officials all over the State. The statute ensures that state attorneys will have sufficient time to familiarize themselves with the facts, local court rules and customs before an order is entered which could have a negative effect on all the citizens of the state. *Georgia Dept. of Medical Assistance v. Columbia Convalescent Center, et al.*, 265 Ga. 638, 640, 458 S.E. 2d 635 (1995). Thus, O.C.G.A. § 9-10-2 has a rational basis and does not offend equal protection guarantees.

CONCLUSION

For the reasons stated above, the Respondent urges the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE

IN THE MATTER OF:	)	In Proceedings Before
Columbia Convalescent	)	The Honorable Brad
Center, Inc. and Comer	)	Hearing Officer
Health Care, Inc.	)	

DECISION OF HEARING OFFICER

The above matter was heard before the undersigned Hearing Officer commencing on Thursday, August 26, 1982 at ten o'clock a.m. at the Department of Medical Assistance, 2 Martin Luther King Jr. Drive, S.E., 12th Floor Board Room, West Tower, Atlanta, Georgia pursuant to a request filed on behalf of Columbia Convalescent Center, Inc. and Comer Health Care, Inc. on February 23, 1982. Mr. Melvin M. Goldstein, Esq. represented Columbia Convalescent Center, Inc. and Comer Health Care, Inc. Mr. Clyde Y. Morris, Jr., Esq., Assistant Legal Services Officer, represented the Department of Medical Assistance. Also present were Mr. Lloyd M. Feiler, Director, Office of Special Services, Department of Medical Assistance, Mr. Albert H. Dallas, Esq., Dallas, Holloway and Fowler, Mr. W. E. Stuckey and Mr. W. E. Stuckey, Jr.

ISSUE AND LAW

1.

The issue presented in this matter is whether Columbia Convalescent Center, Inc. (hereinafter "Columbia") and Comer Health Care, Inc. (hereinafter "Comer") are

entitled to a property and related costs center reimbursement rate of their actual costs in excess of the 90% ceiling established by the Department of Medical Assistance (hereinafter "DMA") in March of 1978 as substantiated by a submitted replacement cost appraisal instead of a property and related cost center standard per diem reimbursement rate of 90% as they were given by DMA on June 17, 1981, pursuant to a policy revision of the Board of Medical Assistance (hereinafter the "Board") of May 7, 1981.

2.

This matter was heard under the authority granted in Chapter 4 of Title 49 of the Official Code of Georgia Annotated (Ga. Laws 1977, p. 384, et. seq) and Chapter 350-4 of the published Rules of the Department of Medical Assistance.

FINDINGS OF FACT

1.

DMA and the Providers, Comer and Columbia, by agreement entered several documents concerning the Providers requests for a reimbursement rate, the Providers subsequent requests for a revision of the property and related costs center reimbursement rate that was originally given by DMA to the Providers on June 17, 1981, and DMA's subsequent denial of any revisions to the original reimbursement rates into the record at the commencement of the aforementioned hearing. (DMA Exhibits A through X).

2.

Pursuant to the appropriate requirements of State law and Section 1122, Title XI of the Social Security Act of 1935, as amended, Comer and Columbia filed applications with the State Health Planning and Development Agency (hereinafter "SHPDA") for a Certificate of Need (CON) and Section 1122 approval prior to commencing construction of their nursing homes. SHPDA granted a CON and §1122 approval of Comer on May 8, 1979 and of Columbia on July 13, 1978. (Providers Exhibits 4A and 4B).

3.

Comer and Columbia entered into contracts with general contractors for the construction of their nursing homes in May and January of 1980 respectively. (Providers Exhibits 13 and 14).

4.

Comer and Columbia received final inspections on the completed buildings from SHPDA on June 22, 1981 and May 18, 1981, respectively. (Transcript, Volume I, p. 122).

5.

Comer and Columbia entered into contracts (Provider agreements) with DMA to provide services for eligible recipients on June 10, 1981 and June 2, 1981 respectively (DMA Exhibits A-1 and A-2).

6.

On May 7, 1981, the Board, at its regularly scheduled meeting, and pursuant to its statutory authority, approved a new policy which removed the replacement cost appraisal override of the 90% ceiling set for property and related costs center reimbursement rates and limited the reimbursement rates for property and related costs center to 90%, the standard per diem, for all facilities having a property transaction after May 6, 1981 (DMA Exhibit ZA-4).

7.

On May 29, 1981, DMA issued a revision in its Policies and Procedures Manual for Nursing Home Services by a memorandum, with the attached revisions to the manual, to all participating nursing homes in accordance with the new policy approved by the Board on May 7, 1981 of limiting property and related costs center reimbursement rates to the standard per diem of 90% (DMA Exhibit ZA-1).

8.

On June 17, 1981 DMA notified Comer and Columbia that their reimbursement rate for property and related costs center would be limited to the standard per diem of 90% in accordance with the Board's policy revision of May 7, 1981 (DMA Exhibits D-1 and D-2).

9.

Although DMA had notified the Georgia Health Care Association approximately on May 1, 1981 of the proposed action to be taken at the Board's May 7, 1981 meeting in regards to a change in the maximum allowable reimbursement rate for property and related costs center for all facilities having a property transaction after May 6, 1981, the Board allowed the public to present their views concerning the Board's Policy action of May 7, 1981 at the Board's regularly scheduled meetings of June 10, 1981 and July 8, 1981, and at the Board's Special Call Meeting of August 20, 1981. After consideration of the numerous detailed comments and views of various representatives of the nursing home industry, the Board reaffirmed its policy action of May 7, 1981 at the Special Call Meeting of August 20, 1981. (Transcript, Volume II, pp. 143-148, DMA Exhibits ZA-6, ZA-7, and ZA-9, Brief of DMA – Exhibits H, I, J and K).

10.

Pursuant to the requirements of Title XIX of the Social Security Act of 1935, as amended, and 42 U.S.C. §1396, on June 26, 1981, DMA submitted the change in the nursing home reimbursement program as a State Plan Amendment to the Department of Health and Human Services (hereinafter "HHS"). On August 4, 1981, HHS approved the State Plan Amendment as submitted by DMA with an effective date of May 7, 1981. (DMA Exhibits ZA-5).

CONCLUSIONS OF LAW

After careful and thorough consideration of the documentary evidence, testimony of witnesses, and oral arguments of both counsel presented at the hearing, the applicable State and Federal statutes, the applicable rules and regulations of DMA, the applicable Federal regulations, and the written briefs and citations of authority submitted by both counsel, the hearing officer concludes the following:

1.

That the Board acted properly and in compliance with O.C.G.A. §49-4-140 et. seq. and its own By-Laws in its meeting of May 7, 1981 in which it limited the reimbursement rate for property and related costs center to the standard per diem of 90% for any facility having a property transaction after May 6, 1981.

2.

That DMA acted properly and in conformance with the statutory requirements of O.C.G.A. §49-4-142 in implementing the Board's policy decision of May 7, 1981.

3.

That according to §350-3-.01(6) of the Rules of DMA, DMA is not required to give notice to providers in accordance with §350-3-.04 of changes in provider manuals, informational type notices or policy interpretations. DMA's Memorandum of May 29, 1981, was a revision in a provider manual.

4.

That according to §350-3-.04(3)(a) of the Rules of DMA, DMA is only required to give advance notice to providers of a change in the method or level of reimbursement when such change is anticipated to amount to one percent or more of the total dollars reimbursed by DMA for a given service in the next twelve months. The change in reimbursement rates that resulted from the Board's action of May 7, 1981, did not reach the one percent threshold.

5.

That any failure of the Board to give advance notice to interested parties and give such parties an opportunity to be heard was cured at the June 10, 1981, July 8, 1981 and August 20, 1981 meetings of the Board. *Health Facilities Investments, Inc. v. Poythress*, C78-1153A (N.D. Ga. March 31, 1981); *Georgia Hospital Association v. Department of Medical Assistance*, C81-88A (S.D. Ga. January 7, 1982).

6.

That the Board's action of May 7, 1981 did not violate the federal statutory and regulatory requirements of 42 U.S.C. §1396 or 42 C.F.R. §447 as evidenced by the subsequent approval by HHS of the State Plan Amendment with an effective date of May 7, 1981, that DMA submitted to HHS as a result of the Board's action of May 7, 1981.

7.

That it is not within the jurisdiction or authority of an administrative hearing officer to overrule an action taken by a federal agency. *Dept. of Natural Resources v. American Cyanamid Co.*, 239 Ga. 740, 743, 238 S.E. 2d 886, 888 (1977); *Hasty v. Carter*, 105 Ga. App. 139, 123 S.E. 2d 563 (1961).

8.

That there is not sufficient evidence in the record in this matter to indicate that the limit on the reimbursement rate for the property and related costs center imposed by the Board's action of May 7, 1981 results in the State Plan providing inadequate overall reimbursement rates to efficiently and economically operated facilities. 42 U.S.C. §1396a(a)(30); 42 C.F.R. §§447, 302(b) (1978); *DeGregorio v. O'Bannon*, 500 F. Supp. 541 (E.D. Pa. 1980).

9.

That the Board's action of May 7, 1981 does not violate the authority of SHPDA as the sole State Agency empowered to determine whether new or modernized nursing home facilities are needed in the State of Georgia. Comer and Columbia, or any other provider for that matter, do not have any statutory or constitutional right to rely on receiving a reimbursement rate from the State of Georgia, through DMA, for a particular service at the same rate that is in effect at the time the provider obtains approval from SHPDA to provide the particular service.

The provider's right to reimbursement for a particular service is created by a contract between the provider and DMA. *Georgia Hospital Association v. Department of Medical Assistance, supra; Springdale Convalescent Center v. Mathews,* 545 F. 2d 943 (5th Cir. 1977).

10.

That while the term "property transaction" in Section 1002.5(a) of the Policies and Procedures for Nursing Home Services (hereinafter the "Manual") as applied to new construction is somewhat unclear, the evidence is clear that both the Board and DMA in their intent, usage, and recent past practice had defined a property transaction, as applied to new construction, as occuring upon the date a reimbursement rate was issued and effective. The evidence is also clear that the May 29, 1981 Memorandum attached to manual revisions of May 7, 1981, which was sent to all participating providers including Comer and Columbia, explains the effect of the May 7, 1981 revisions as applying to reimbursement rates issued by DMA on or after May 7, 1981. Furthermore, the presence of one of Comer's and Columbia's owners at the June 10, 1981 Board meeting evidences that Comer and Columbia either knew that a property transaction as applied to new construction occured on the date a reimbursement rate was issued or that the Board and DMA had intended that a property transaction as applied to new construction occured on the date a reimbursement rate was issued. Since it is undisputed by the parties that a property transaction as applied to a sale or lease occurs on the date the sale or lease becomes effective and this is the first date a provider could possibly provide a service that

would entitle the provider to a reimbursement, logically a property transaction as applied to new construction could not occur prior to the first date a provider could possibly provide a service that would entitle the provider to a reimbursement. Therefore, a property transaction as applied to new construction occurs on the date the new facility is completed, able to provide services, and eligible to receive a reimbursement rate from DMA. O.C.G.A. §§13-2-2(a), 13-2-3, and 13-2-4; *First National Bank v. Hancock Whse. Co.*, 142 Ga. 99, 82 S.E. 481 (1914); *Brooke v. Phillips Petroleum Co.*, 113 Ga. App. 742, 149 S.E. 2d 511 (1966); *Federal Land Bank v. Shingler*, 174 Ga. 352, 162 S.E. 815 (1932).

DECISION

The action of DMA in applying the Board's policy revision of May 7, 1981 in determining the reimbursement rate for property and related costs center that Comer and Columbia are entitled to is correct and is hereby affirmed. Comer and Columbia are only entitled to a property and related costs center standard per diem reimbursement rate of 90% as they were given by DMA on June 17, 1981.

OPINION

The Hearing Officer recognizes the frustrations and financial problems that have been experienced by Comer and Columbia in trying to maintain viable nursing homes and in providing care to recipients who are covered by the State plan and whose charges are either wholy or partially paid to Comer and Columbia by the State

through DMA. But Comer and Columbia, as well as all other providers, must recognize that the reimbursement rate for medical services provided to eligible recipients is created by a contract between the DMA and the provider, and is not intended to guarantee the provider that their costs will always be covered by reimbursement from the State, as stated in *Briarcliff Haven, Inc. vs. Department of Human Resources,* 430 F. Supp. 1355, 1363 (N.D. Ga. 1975) as follows: "The Medicaid program is not designed too protect providers from the consequences of their business decisions or from business risks." Simply stated a provider is not entitled, nor guaranteed, that the rate of reimbursement in effect on the date that an application is submitted to the appropriate State Agency will necessarily be the rate of reimbursement on the date the provider and DMA enter into a contract. If the rate of reimbursement does in fact change, the provider does not have to execute the contract with DMA, or it can make other arrangements to meet its financial needs.

Perhaps someday in the future rates will be guaranteed by the Government, but that is not and cannot be the case today. In these times of constantly rising medical costs and burgeoning Government budget deficits, it is imperative in order to keep medical care available to as many citizens as possible, that the Governmental bodies empowered to provide medical care assistance to its citizens be able to enact proper costs containment measures. Otherwise, either these governmental programs will be destroyed financially and no citizens will get assistance, or the current government budget deficits will mushroom at such a rate that our entire economic system will collapse.

Issued this 7th day of October, 1983.

/s/ Brad Cohen
BRAD COHEN
Hearing Officer